No. 2735.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT, AT SAN FRANCISCO.

PACIFIC COAST CASUALTY COMPANY,
Plaintiff in Error,

v.

GENERAL BONDING & CASUALTY INSURANCE COMPANY,
Defendant in Error.

Upon Writ of Error to the District Court of the United States for the Northern District of California, Second Division, at San Francisco.

BRIEF FOR DEFENDANT IN ERROR.

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EGAN PRINTING CO., DALLAS

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INTRODUCTORY.

The writer of this brief lives so far from San Francisco that unless the brief for the plaintiff in error shall be filed sooner than the rules require we shall have no opportunity to make direct reply thereto. There are nineteen assignments of error, and the nineteenth is subdivided into nineteen specifications; and yet the merits of the case lie within narrow boundaries. For these reasons we ask the court's permission to present the case of the defendant in error independently, and to leave for a supplemental memorandum any direct response that we may wish to make to the brief of the plaintiff in error if received in time for answer.

FACTS OF THE CASE.

Under date of June 18, 1911, the defendant issued to Elmo Rock Company a policy of employer's liability insurance, running for the term of one year and covering its business of quarrying and crushing rock. The policy contained, among others, the following provisions relevant to this litigation (Tr., 13-21, 149).

"In consideration of the warranties herein and of Eighty-four and 00-100 Dollars ($84.00) estimated premium, the Pacific Coast Casualty Company, of San Francisco, California,

hereinafter called the Company, hereby insures the Elmo Rock Company of the County of Kaufman, State of Texas, hereinafter called the Assured, against loss and expense arising from claims upon the Assured for damages on account of bodily injuries accidentally suffered or alleged to have been suffered during the period of this policy by any employee of the Assured by reason of the prosecution of the work described herein. This insurance is subject to the following conditions.

"A. The Company's liability on account of an accident to one person is limited to Five Thousand and 00-100 Dollars ($5,000)****.

"B.**** If a claim is made on account of an accident, the Assured shall give like notice thereof; and the Company, at its own expense, will settle or contest the same. If a suit is brought on account of an accident, the Assured shall forward immediately to the Company, or to its duly authorized agent, every process and paper served on him. The Company, at its own expense, will settle or defend said suit whether groundless or not; the moneys expended in said defense shall not be included in the limits of the liability fixed under this policy. The Assured shall not assume any liability, nor interfere with any negotiation for settlement or any legal proceeding, nor incur any expense nor settle any claim except at his own cost, without the written consent of the Company.

"C. The Assured shall render to the Company at all times all co-operation and assistance in his power

"L. No action shall lie against the Company for any loss or expense under this policy unless it shall be brought for loss or expense actually sustained and paid in satisfaction of a final judgment, within ninety days from the date of said judgment and after trial of the issue."

Within the time limit and the conditions of the policy, one J. B. Sowders, an employee of Elmo Rock Company, sustained injuries on account of which he sued it (Tr., 111-112, 89-90). Having been duly notified of the accident, the claim and the suit, Pacific Coast Casualty Company undertook the defense of the suit; which it conducted through counsel employed by it, but in the name of Elmo Rock Company. The attorney so employed was John Davis, of the firm of Meador & Davis, whom the defendant habitually employed in its controversies in that locality. The suit resulted in a judgment in favor of Sowders for $5,000 and interest and costs (Tr., 90, 114, 131).

Davis notified the defendant of the rendition of the judgment, and was instructed as follows by letter dated June 28, 1912: "Kindly proceed with the appeal of this case, but you will understand that we do not furnish a supersedeous (sic)

bond staying execution" (Tr., 132, 140-141). Davis requested Elmo Rock Company to furnish a supersedeas appeal bond; but it refused to do so, upon the ground that Pacific Coast Casualty Company should do this. Davis wrote again urging that the Rock Company furnish the bond. A copy of the correspondence having been forwarded to the defendant, it wrote to Davis July 30, 1912, saying: "We endorse your action in this matter and will ask you to proceed with the appeal, but the assured must furnish its own supersedeous (sic) bond" (Tr., 142-144).

Under the law of Texas, Sowders was entitled to an execution on his judgment twenty days after the overruling of the motion for a new trial, unless a supersedeas bond on appeal were theretofore filed. This time would expire August 9, 1912. By filing within twenty days a supersedeas bond, which might be made by a surety company, execution could be stayed pending appeal. Copies of the statutes are annexed to the complaint for the convenience of all concerned. This court and the district court take judicial cognizance of them (Tr., 22-24, 26).

W. L. Leeds, as managing partner of Miller-Stemmons Company, was agent for Pacific Coast Casualty Company under J. F. Seinsheimer & Co. of Galveston, its general agents. Through his agency the employer's liability policy in suit was issued. He also "brokered" some business with the plaintiff (Tr., 113-114). He testified that he thought, though he could not speak positively, that his firm was authorized by J. F. Seinsheimer & Co. to have executed the appeal bond which was procured from the plaintiff (Tr., 120), and the court found that such authority was given (Tr., 76). He testified that when the bond had to be made, he called on Mr. Stephenson, president of the plaintiff company, and the latter consented to make the bond provided an indemnity bond were given by the defendant company (Tr., 117). He procured such an indemnity bond, he testified, from the defendant company through the attorneys. Meador & Davis (Tr., 115). He paid to the plaintiff the premium for the appeal bond, and was reimbursed for the outlay by the defendant company through J. F. Seinsheimer & Co. (Tr., 116-117).

Davis testified that he spoke to Mr. Stephenson, president of the plaintiff company, about making the appeal bond, and showed him the defendant company's letter of June 28, 1912, above mentioned, and left it with Mr. Stephenson. He could

not remember any of the conversation, but was sure that he exhibited the letter. He signed and delivered the indemnity contract hereinafter mentioned, which he said was prepared by Stephenson (Tr., 133-138).

Stephenson testified that Davis applied to him for the appeal bond, furnished the form of it, and said that the judgment would be taken care of if affirmed, and that the defendant would indemnify his company. He said there was no discussion of Davis' authority, and that he understood that Davis had authority to do what was done. His recollection was that the appeal bond was executed on Davis' oral assurance, and that the indemnity agreement, which Davis prepared as he had promised to do, and probably a formal application for bond, were sent in afterward. He said it was the custom for attorneys at law to apply for appeal bonds, and that it was customary for him to issue them on oral application to be followed by formal written application, and that he had made other appeal bonds for Davis. He was unable to find a written application for the bond in this case, and was not sure that one was received. He said Davis did not show him the company's letter of June 28, 1912, and that he never saw it until he found it among the papers when he was called upon to pay the judgment after its affirmance (Tr., 121-130).

The court found that Stephenson was not shown the company's letter of June 28, 1912, and was not in any way made aware of any limitations upon the authority of Davis, and dealt with him in the supposition that his authority was that which was usual in such cases, and was apparently possessed by him (Tr., 78).

Accordingly, Davis delivered to the plaintiff company a paper dated August 6, 1912, and signed "Pacific Coast Casualty Company, by John Davis, its attorney at law and in fact," whereby the defendant agreed to indemnify the plaintiff against all loss and expense incurred by reason of signing the desired supersedeas appeal bond in the Sowders case, a copy of which paper is attached to the complaint as Exhibit D (Tr., 132, 136, 115, 127, 24-25, 76-78).

In consideration of the indemnity agreement and of the payment of a premium therefor, the plaintiff executed under date of August 6, 1912, a supersedeas appeal bond in the Sowders case, a copy of which is annexed to the complaint as Exhibit E. This bond was signed by Elmo Rock Company as principal, and was approved and filed August 7, 1912, thus

accomplishing the appeal from the judgment and the stay of execution thereon (Tr., 26-27, 132, 127, 75, 153).

The appeal resulted in the affirmance of the judgment and the consequent rendition of judgment against both Elmo Rock Company and the plaintiff for the amount of the principal, interest and costs. The mandate of the court of civil appeals was filed in the district court August 18, 1913, that being, under the Texas practice, the final step in the litigation (Tr., 29-30, 154, 78-79).

Execution was duly issued on the Sowders judgment, and was levied by the sheriff on a large amount of real and personal property belonging to Elmo Rock Company (Tr., 154-164). Thereupon a stockholder applied for the appointment of a receiver, a receiver was appointed, and the property levied upon was delivered by the sheriff to the receiver (Tr., 173-181, 162, 108). Sowders then sued out an alias execution for the collection of his judgment from the plaintiff company (Tr., 93, 97, 79-80).

Thereupon, on October 22, 1913, less than ninety days after the filing of the mandate, the plaintiff company paid to Sowders and his attorneys and assignees the amount then due for the principal and interest of his judgment, $5,400.50; and on October 25, 1913, it paid the court costs, amounting to $160.40. The owners of the judgment assigned it to the plaintiff company when its amount was paid to them. The plaintiff company made this payment in discharge of its obligation upon the supersedeas appeal bond, and also upon the request of the receiver of Elmo Rock Company (Tr., 34-38, 127, 102-103, 80).

Afterward, on November 4, 1913, under order of the court in which the receivership suit was pending, the policy of employer's liability insurance issued by the defendant to Elmo Rock Company was assigned by the receiver of that company to the plaintiff (Tr., 33-38, 102-103, 109, 80). The defendant having refused to pay the policy, this suit was brought to recover thereon.

The receiver testified that the property levied upon by the sheriff in the Sowders case, and then in the hands of the receiver, consisted of nineteen acres of land worth $19,000 and encumbered by a lien of $3,500 prior to the execution lien, and of personal property estimated at some $4,000 or $5,000 (Tr., 108), and that the total indebtedness of the company

was some $10,000 (Tr., 111). The court found that the land levied on was worth $19,000 with a lien of $3,500 prior to the execution lien (Tr., 80).

MORALS OF THE CASE.

The writer of this brief has an abiding faith in the proposition that courts sit to do justice, and not merely to settle disputes, and that a court always wishes to do justice, and always will do it unless it finds legal obstacles which seem to it insuperable. As a matter of right the plaintiff ought to recover in this case in accordance with the judgment of the court below. The defendant, for a premium, insured Elmo Rock Company against loss from the Sowders claim. In the exercise of its contract right, it assumed entire control of the defense of the Sowders claim. Perhaps Elmo Rock Company could have defended it more successfully. When defeated in the trial court, the defendant and Elmo Rock Company together procured the plaintiff to obligate itself for the payment of the Sowders judgment by signing as surety a supersedeas appeal bond. In other words, they requested the plaintiff to pay it in Elmo Rock Company's behalf if it should be affirmed and they should fail to pay it themselves. To this extent at least there can be no doubt that the act of Leeds and Davis was by the defendant either authorized or ratified or both. In addition, the defendant's attorney Davis expressly agreed in its name to indemnify the plaintiff against all loss and against all incidental expense that might ensue. The plaintiff required this contract of indemnity as a condition to its making the supersedeas appeal bond. It accepted the contract of indemnity and made the bond, in reliance upon the apparent authority of Davis to do what he did do, and in ignorance of any limitations upon that authority. The appeal failed, and according to the usages of the business the defendant should have paid the judgment. It refused to do so. Execution was levied upon the property of Elmo Rock Company, and thereby a receivership of that otherwise solvent corporation was precipitated. In pursuance of the request of the receiver then made, and of the request of the defendant and Elmo Rock Company made when the supersedeas bond was procured, the plaintiff, in behalf of Elmo Rock Company, paid the full amount due upon the judgment and took an assignment thereof Thus it holds against Elmo Rock Company the judg-

ment and an execution lien upon land which the receiver testified, and the court found, to be fairly worth more than twice the amount of the judgment, over and above prior encumbrances. In consideration of this payment the receiver transferred the defendant's policy to the plaintiff as an additional, and the primary, security for the debt. The defendant ought to pay; and the only question is whether it has brought to the court's attention any defense which will enable it to avoid payment. We shall consider first the defenses urged which appear to be of substantive character, and then the criticisms made by the defendant upon the procedure and findings of the trial court.

DEFENSES URGED.

Assignability of Policy in Suit.

PROPOSITION.

The policy of liability insurance sued upon has been validly assigned to the plaintiff, which has the right to sue thereon.

Statement.

The seventeenth assignment of error (Tr., 208-210) is based upon the court's admission in evidence of the assignment of the policy in suit, over an objection to the effect that the policy was not assignable to the plaintiff in the circumstances that existed. The eighteenth assignment of error (Tr., 211-212) is based upon the action of the court in overruling the defendant's motion for a nonsuit, which in turn was founded in part upon the proposition that the assignment of the policy of liability insurance to the plaintiff was void, and that the policy was not assignable.

In pursuance of an order of court authorizing him to do so (Tr., 33-34, 172-183), the receiver of Elmo Rock Company on November 4, 1913, assigned the policy to the plaintiff by a written instrument, which recited at considerable length the antecedent circumstances and the consideration of the assignment. After reciting the issuance of the policy, and the recovery by Sowders of a judgment for an injury sustained by him and coming within the purview of the policy, and the appeal from said judgment by Elmo Rock Company upon a supersedeas bond made by the plaintiff, and the affirmance of said judgment, and the appointment of W. D. Fletcher as re-

ceiver for Elmo Rock Company, the assignment proceeded with recitals as follows:

"And whereas at the request of said W. D. Fletcher as receiver and in the discharge of its obligations as surety upon the supersedeas appeal bond aforesaid, said General Bonding & Casualty Insurance Company has on this 22d day of October, 1913, paid to the owners and holders of said judgment the amount due them thereon, to wit, the sum of five thousand four hundred dollars and fifty cents, and in addition has paid to the officers of court the costs taxed in said cause, to wit, the sum of one hundred sixty dollars and forty cents, thereby discharging said judgment in full as between said Elmo Rock Company and the owners and holders of said judgment other than said General Bonding & Casualty Insurance Company itself. And whereas, by virtue of the premises said General Bonding & Casualty Insurance Company has become subrogated to all the securities held by said Elmo Rock Company for the payment of the indebtedness represented by said judgment, and has become entitled to have all such securities duly transferred to it. And whereas, said W. D. Fletcher, as receiver, has been authorized and instructed by order of the District Court of Kaufman County, Texas, to assign and transfer said liability policy to said General Bonding & Casualty Insurance Company, the same being a security held by Elmo Rock Company for the payment of the debt represented by said judgment" (Tr., 34-37).

C. M. Crumbaugh, attorney for Elmo Rock Company at the time of the Sowders suit, and afterwards for the plaintiff in the receivership suit against Elmo Rock Company, and apparently for the receiver, testified that the various recitals contained in the assignment were in accordance with the facts (Tr., 103).

Argument.

When the supersedeas appeal bond was signed by Elmo Rock Company as principal and by the plaintiff as surety, by its act in executing the bond Elmo Rock Company impliedly requested the plaintiff to pay the judgment appealed from if it should be affirmed and if Elmo Rock Company should not pay it, and impliedly agreed to indemnify the plaintiff against any loss so incurred. After the judgment had been affirmed, and an execution had been levied upon the property of Elmo Rock Company, and a receiver had been appointed for that company, and the sheriff had turned over to him the property levied upon, and an alias execution had been issued for the

purpose of collecting the judgment from the plaintiff, in consequence of the situation so created and in pursuance of some further request made by the receiver, the plaintiff paid to the holders of the judgment and the officers of the courts the amount of the judgment and interest and costs, taking from its owners an assignment of the judgment and from the receiver an assignment of the policy. The policy was assigned by the receiver as a security for the debt owing by Elmo Rock Company to the plaintiff, because Elmo Rock Company was under obligation to reimburse the plaintiff for the money expended and because it was thought that the plaintiff was entitled to be subrogated especially to the policy.

The consideration for the assignment was meritorious and entirely sufficient; but even if it had not been so, any defect of consideration would have been a matter of no concern to the defendant.

The policy contains no clause undertaking to prohibit its assignment. In this respect it differs from many policies of insurance. But such a clause, even if there were one, would be ineffective to prevent the assignment of the policy after its term had expired, and when it was valuable only as a contract for the payment of a loss already accrued and merged in judgment.

> Maryland Casualty Co. v. Omaha Electric Light & Power Co., 85 C. C. A. 106, 157 Fed. 514; Bowron v. Georgia Casualty Co., 223 Fed. 673; Fenton v. Fidelity & Casualty Co., 36 Ore. 283, 56 Pac. 1096; Beacon Lamp Co. v. Travelers Ins. Co., 61 N. J. Eq. 59, 47 Atl. 579; Moses v. Travelers Ins. Co., 63 N. J. Eq. 260, 49 Atl. 720; 2 May on Insurance (4th ed), § 386; Fuller on Accident and Employers' Liability Insurance, 469; 1 Bacon on Benefit Societies (3rd ed.), § 300; Richards on Insurance (3rd ed.), § 268.

Payment of the Judgment.

proposition.

The Sowders judgment was so paid as to constitute it a loss for which Elmo Rock Company and the plaintiff as its assignee are entitled to be reimbursed by the defendant under the terms of the policy sued upon.

Statement.

The eighteenth assignment of error (Tr., 211-212) is based upon the action of the court below in overruling the defendant's motion for a nonsuit, which was founded in part upon its proposition

"That said policy of insurance is a policy of indemnity against loss by the assured, the Elmo Rock Company; that the Elmo Rock Company has never suffered loss, has never been called upon to pay and has never paid anything in connection with the case of Sowders vs. Elmo Rock Company."

The seventeenth subdivision of the nineteenth assignment of error is as follows (Tr., 217):

"The evidence was and is insufficient and there is no evidence to sustain the finding of the court that loss or expense was actually sustained and paid in satisfaction of a final judgment by Elmo Rock Company within ninety days from the date of said judgment, and after trial of the issue, for the reason that the evidence shows that said Elmo Rock Company did not sustain and pay any loss or expense in satisfaction of any final judgment, and the evidence shows that no such loss or expense was paid within ninety days from the date of said judgment and after trial of the issue."

The contention made in these two assignments is predicated upon paragraph L of the policy, reading as follows (Tr., 18-19):

"No action shall lie against the company for any loss or expense under this policy unless it shall be brought for loss or expense actually sustained and paid in satisfaction of a final judgment, within ninety days from the date of said judgment and after trial of the issue."

Argument.

The policy in suit is more than a policy of indemnity. Finley v. United States Casualty Co., 113 Tenn. 592, 83 S. W. 2, is typical of the cases upon which the defendant's counsel will rely in support of their contention. The great difference between the policy in suit and those involved in such cases may be shown by printing in parallel columns the relevant provisions of the policy here sued on and the one sued on in the Finley case.

Case at Bar.	Finley Case.
"In consideration of the warranties herein and of Eighty-four and 00-100 Dollars ($84.00)	"In consideration of $28.80 premium the United States Casualty Company, herein

estimated premium, the Pacific Coast Casualty Company, of San Francisco, California, hereinafter called the Company, hereby insures the Elmo Rock Company of the County of Kaufman State of Texas hereinafter called the Assured, against loss and expense arising from claims upon the Assured for damages on account of bodily injuries accidentally suffered or alleged to have been suffered during the period of this policy by any employee of the assured by reason of the prosecution of the work described herein. This insurance is subject to the following conditions."

called the company, does hereby agree to indemnify the Johnson City Veneer Mills *** herein called the assured, for the term of twelve months, *** subject to the following special and general agreements, which are to be construed as coordinate, as conditions; against loss from common law or statutory liability for damages on account of bodily injuries, fatal or non-fatal, accidentally suffered within the period of this policy, by any employee or employees, of the assured while on duty within the factory, shop or yards mentioned in the schedule hereinafter given, or upon the ways immediately adjacent thereto provided for the use of such employees or the public, in and during the operation of the trade or business described in the said schedule."

"Upon the occurrence of an accident the Assured shall give to the Company, or to its duly authorized agent, immediate written notice thereof, with the fullest and most accurate information obtainable; and the Company, at its own expense, will make such investigation as it may deem necessary. If a claim is made on account of an accident, the Assured shall give like notice thereof; and the Company, at its own expense, will settle or contest the same.

"If a suit is brought on account of an accident, the Assured shall forward immediately to the Company, or to its duly authorized agent, every process and paper served on him. The Company, at its own expense, will settle or defend said suit whether groundless or not; the moneys expended in said defense shall not be included in the limits of the liability fixed under this policy. The Assured shall not assume any liability, nor interfere with any negotiation for settlement or any legal proceeding, nor incur any expense nor settle any claim except at his own cost, without the written consent of the Company."

"The Assured shall render to

"The assured upon the occurrence of an accident shall give immediate written notice thereof with the fullest information obtainable at the time, to the home office of the company at New York, or to its duly authorized agent. He shall give like notice with full particulars of any claim that may be made on account of such accident, and shall at all times render to the company all cooperation and assistance in his power."

"If thereafter any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, the assured shall immediately forward to the home office of the company every summons or other process as soon as the same shall have been served on him, and the company will at its own cost, defend against such proceeding in the name and on behalf of the assured or settle the same, unless it shall elect to pay to the assured the indemnity provided for in clause A of special agreements as limited therein."

"The assured shall not settle any claim except at its own cost, nor incur any expense, nor interfere in any negotiation for

the Company at all times all co-operation and assistance in his power."

settlement or in any legal proceeding, without the consent of the company previously given in writing, but he may provide at the time of the accident such immediate surgical relief as is imperative. The assured, when requested by the company, shall aid in securing information, evidence, and the attendance of witnesses and in effecting settlements and in prosecuting appeals."

"No action shall lie against the Company for any loss or expense under this policy **unless it shall be brought for loss or expense actually sustained and paid** in satisfaction of a final judgment, within ninety days from the date of said judgment and after trial of the issue."

"No action shall lie against the company as respects any loss under the policy, **unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him** in satisfaction of a judgment within sixty days from the date of such judgment and after trial of the issue."

The policy involved in the Finley case was a typical policy of indemnity, and fairly drawn to indicate its character as such. The policies which in other cases have been held to be policies of indemnity resembled it closely. But it was very different from the policy here in suit. By the policy in the Finley case the company agreed to indemnify the assured against loss from common law or statutory liability for damages suffered. By the policy in the case at bar the company insured Elmo Rock Company against loss and expense arising from claims for damages suffered or alleged to have been suffered. An agreement to indemnify against legal liability for damages actually suffered is a very different thing from an agreement to insure against loss or expense arising from claims for damages suffered or alleged to have been suffered.

By the policy involved in the Finley case the company required the insured to notify it of accident, of claim, and of suit. In the event of suit on account of an accident covered by the policy it agreed to defend or settle the suit at its own cost, unless it should elect to pay to the insured the amount of the policy. By the policy here sued upon the company required notice of accident, and agreed that it would make at its own expense such investigation as it deemed necessary. It required notice of claim, and agreed that at its own expense it would settle or contest the same. It required notice of suit, and agreed that at its own expense it would settle or defend the suit whether groundless or not, making no exception of

suits for damages on account of accidents not covered by the policy, and reserving no right to pay the principal sum of the policy and avoid further expense.

By the policy involved in the Finley case it was provided that no action should lie against the company unless it were brought by the assured himself to reimburse him for a loss actually paid by him. The corresponding clause in the policy here in suit merely provides that no action shall lie unless brought for loss or expense actually sustained and paid. There is no restriction to the effect that the suit must be brought by the assured himself or that the loss must be paid by himself.

As hereinbefore shown, the Sowders judgment was paid by the plaintiff in pursuance of an arrangement to that effect long before made with it by Elmo Rock Company and the defendant. By signing the supersedeas appeal bond, the plaintiff agreed that if Elmo Rock Company or the defendant did not pay the judgment in the Sowders case in the event of its affirmance, the plaintiff would pay it. By signing the supersedeas appeal bond as principal and accepting the plaintiff's signature thereof as surety, Elmo Rock Company authorized and requested the plaintiff to pay the Sowders judgment, if it should not be otherwise paid, and agreed to reimburse the plaintiff for any sum so expended by it. In contemplation of law a man does what he causes to be done. Therefore, so far as all parties except themselves were concerned, when Elmo Rock Company caused the plaintiff to pay the Sowders judgment, Elmo Rock Company paid the judgment. We think this would be sufficient even if the language of the policy in suit were like that of the policy involved in the Finley case. Certainly it seems sufficient to meet the requirement of the provision of the policy in suit that the present action shall be brought for loss or expense actually sustained and paid, without a stipulation that it shall be brought by the insured himself for loss paid by himself. This proposition is abundantly sustained by the authorities. As will be observed in reading the cases below cited, courts generally have been indisposed to help liability companies in slipping out of their obligations by means of clauses analogous to that now under consideraiton, and have been very liberal in interpreting such clauses with reference to the matter of what constitutes payment that will entitle the assured to recover from the liability company.

Maryland Casualty Co. v. Omaha Electric Light &

Power Co., 85 C. C. A. 106, 157 Fed. 514; Bowron v. Georgia Casualty Co., 223 Fed. 673; Kennedy v. Fidelity & Casualty Co., 100 Minn. 1, 110 N. W. 97; Seattle & S. F. Ry. & Nav. Co. v. Maryland Casualty Co., 50 Wash. 44, 96 Pac. 509; Taxicab Motor Co. v. Pacific Coast Casualty Co., 73 Wash. 631, 132 Pac. 393; Herbo-Phosa Co. v. Philadelphia Casualty Co., 34 R. I. 567, 84 Atl. 1093; West Riverside Coal Co. v. Maryland Casualty Co., 155 Iowa 161, 135 N. W. 414.

New Omaha Thompson-Houston Electric Light Company had a policy of liability insurance issued by Maryland Casualty Company, and was sued for damages resulting from an accident occurring while the policy was in force. In this suit judgment was rendered against the company January 3, 1902, for $5,000, and affirmed by the supreme court April 22, 1903. A rehearing having been granted, the judgment was again affirmed by the supreme court June 8, 1905. Between the two dates last mentioned the electric light company transferred all its assets, liabilities and business to Omaha Electric Light & Power Company. In pursuance of its contract of assumption of the liabilities of the electric light company first mentioned, Omaha Electric Light & Power Company paid the judgment for damages July 21, 1905, and later brought suit against Maryland Casualty Company to recover upon the liability policy. The casualty company defended upon the ground that the policy had been assigned without its consent and that it had no contract with the plaintiff, and upon the ground that the electric light company which it had insured had not itself paid the judgment debt. Among others the policy then in suit contained the following provisions:

"Any assignment of interest under this policy shall be void unless the written consent of the company is endorsed hereon by one of its officers.

"No action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue."

The court will observe that the questions raised in the case at bar were raised in that case, upon facts less favorable to the plaintiff than those with which we now are dealing, and under policy provisions practically identical with those of the policy involved in the Finley case. The circuit court of ap-

peals for the eighth circuit (Van Devanter, Adams and Riner), speaking through Circuit Judge Adams, said:

"Do the first and second provisions of the policy above set forth defeat plaintiff's right to recover as assignee or successor of the Thompson Company, the assured named in the policy? The provisions referred to avoid the policy in the event of its asignment without the written consent of the insurer and declare that no action to recover on the policy shall lie against the insurer unless brought by the assured himself to reimburse him for loss actually sustained in the payment of a final judgment on the merits. The assignment in question was made after the assured sustained the loss and after it had been adjudged to be a legal liability against it. Dent had been insured. His administratrix had instituted suit and had prosecuted it to final judgment against the assured before the latter transferred its claim against the insurer for reimbursement, to the plaintiff. At that time the term of the policy had expired, and the character of the assured for integrity and prudence, on the strength of which the insurer might have relied in making its contract, could no longer affect its liability. The recognized reasons for the prohibition of assignments without the consent of the insurer had ceased. Its liability had become fixed, and like any other chose in action was assignable regardless of the conditions of the policy in question. This is settled by the great weight of authority (citations omitted).

"In view of this conclusion the other contention of the defendant, based on the provision of the policy, to the effect that no action can be maintained against the insurer except by the assured after satisfaction by it of a judgment rendered against it, requires little consideration. On familiar principles the assignee stands in the shoes of the assignor, and must perform all the conditions precedent to recovery which the assignor was required to perform. The plain meaning of the provision in question, taken in connection with the established assignability of the claim to the plantiff, is that to render defendant liable on the contract there must have been a loss to the assured, that loss must have been fixed by a final judgment, and that judgment must have been paid in order to constitute a loss within the terms of the policy. Such is the substance and meaning of the contract. Whether the loss is actually paid directly by the hand of the assured, or by some assignee of the claim for indemnity who, for value received from the assured, has assumed the judgment liability, is immaterial. 'Qui facit per alium facit per se.' The plaintiff paid the judgment against the assured as part consideration for a transfer of its assets, and that was payment by the assured within the purview of the policy (citation omitted). There is no impeachment of the good faith of the transfer or of the sufficiency of the consideration for the assumption of the judgment debt by the plaintiff. We entertain no doubt

that the case shows such a loss to the assured as within the true interpretation of the policy entitles its assignee to recover on the indemnity contract." Maryland Casualty Co. v. Omaha Electric Light & Power Co., 85 C. C. A. 106, 157 Fed. 514.

Bowron, as trustee in bankruptcy of Southern Iron & Steel Company, obtained from Georgia Casualty Company a policy of employer's liability insurance in his favor, which was conceded to be merely a contract of indemnity against loss, and not a contract of insurance against liability. He sold the assets of the estate to persons who assumed his liability to employees for personal injuries. These buyers transferred their contract of purchase to Standard Steel Company with assumption of such liability, and Bowron conveyed the assets directly to that company. Thereafter Standard Steel Company conveyed the property to Gulf States Steel Company with a third assumption of liability. In the meantime Sibert recovered against Bowron, as trustee, a judgment for $5,000 for injuries received while in Bowron's employ. In pursuance of its contract of assumption of liability Gulf States Steel Company gave to Bowron its check for the amount of the judgment, and he endorsed the check over to the clerk of the court in payment thereof. Then he sued the casualty company on the policy of liability insurance for the benefit of Gulf States Steel Company. The casualty company in that case claimed, as does the one defending the case at bar, that it had contracted only to reimburse Bowron for a loss actually sustained and paid by him, and that there had been no such loss, inasmuch as the judgment had been paid by Gulf States Steel Company in pursuance of its obligation to do so and to hold Bowron harmless against the same. That was a much stronger situation from the point of view of the defendant than the one with which this court has now to deal. The court thought that the necessary tendency of a requirement that the purchaser assume the liability of the trustee for injuries to his employees would be to lessen the cash price offered for the assets, and that on the other hand the presence of the liability policy among the assets would have a tendency to counterbalance this requirement, and to increase the price offered for the assets to their normal value unaffected by the requirement of assumption of liability; and so the court held that Gulf States Steel Company was justly entitled to the benefit of the

policy of liability insurance, and that payment made in this way satisfied the terms of the policy. The court said:

"It seems clear that the tendency of such a stipulation would be to induce the bidder to bid less because of it. Nor does it seem that the exact amount of the liability assumed would have to be known to the purchasers at the time of their bid to make the principle applicable, though, if it were not ascertained, it might be difficult or impossible to show the extent to which the assumption affected the bid. Loss to the creditors would be presumed from an onerous stipulation imposed on the bidders.**** In this case, however, there was an outstanding indemnity against loss from injury to employees of the trustee during operation, at the time the purchasers bought the assets; i. e., the policy issued to the trustee by the defendant, on which this suit is brought. The purchasers were, therefore, when bidding, confronted on the one hand with the liability they were required to assume, and, as against it, the indemnity held by the trustee as against a loss on that account. In making their bid they would be affected by the nature of the liability, and also by the character of the indemnity against it, if they considered the indemnity available to them, as I think the record shows they were justified in doing. **** As I see it, the loss is not eliminated by the order of sale, but is merely transferred from the trustee to the purchasers. The defendant's agreement was to indemnify against loss on account of the accident, and, as long as the loss remains, it would seem to be immaterial to the defendant whether the loss was paid to the plaintiff for the use of the creditors, or for the use of the Gulf States Steel Company, as the successors of the purchasers who had assumed it. It cannot be presumed that the court, by its order, intended to separate the indemnity from the loss, and so make it totally unavailable, though the loss still remained unsatisfied. The presumption would rather be that the court intended the right to avail of the indemnity to follow the loss, and so, by its tendency to increase the bid, to preserve its value to the estate, which had paid the premium for the protection afforded by it. This would be accomplished by subrogating the Gulf States Steel Company to the rights of the trustee under the policy after it had paid the judgment.**** For this reason it seems to me that the original purchasers, having presumably saved the estate a loss in the price realized for the assets by the trustee at the sale by bidding without deduction for the assumption exacted of them, in reliance of being accorded the benefit of the protection afforded by the indemnity held by the trustee against the assumed liability, ought to be subrogated to the right of the trustee to claim a loss sustained by the accident to Sibert, and which they had assumed, in a sense that would sustain this action by the trustee against the defendant, though the recovery be, and I have no doubt is, for the benefit of the Gulf States Steel Company. The judgment

having been paid in fact directly by the trustee to the clerk of this court, in view of the conclusion I have reached, it is immaterial whether the money was furnished the trustee by the Gulf States Steel Company as a loan or under its obligation to take care of the judgment." Bowron v. Georgia Casualty Co., 223 Fed. 673.

In Herbo-Phosa Company v. Philadelphia Casualty Company, above cited, the supreme court of Rhode Island held sufficient a payment accomplished in this wise. The judgment debtor gave his note to a bank for money with which he discharged the judgment, and which the judgment creditor immediately deposited in the same bank, taking therefor a certificate of deposit which was pledged to the bank as security for the note, all this being done as a single transaction.

In Taxicab Motor Company v. Pacific Coast Casualty Company, above cited, the supreme court of Washington held sufficient to entitle the insured to maintain its action against the liability company, a satisfaction of the judgment procured by the giving by the judgment debtor of its promissory note for the amount of the judgment with interest to the judgment creditor. Thereby the judgment creditor released a higher form of security upon receipt of a lower form of security for the same amount. The defendant in that case was the same as in this, but from its point of view the provisions of the contract there sued upon were much stronger than those of the policy now in suit.

Amount of Judgment.

proposition.

The judgment of the court below should not be disturbed upon the ground that it is excessive.

Statement.

The judgment includes interest upon the Sowders judgment pending the appeal therefrom. The decisions are not in harmony upon the question whether such a recovery is proper in a suit upon a liability policy of the common form. We think it is proper in the present case. But whether it is so is a question not presented to this court because there is no assignment of error attacking the judgment upon the ground that it is excessive. We say this merely because the question is one

that naturally would occur to the court in its consideration of the case, and might cause it unnecessary trouble.

DEFENDANT'S CRITICISMS OF THE COURT'S PROCEDURE AND FINDINGS.

Motion for New Trial.

PROPOSITION.

The court will not consider the matters urged under the nineteenth assignment of error.

Statement.

The nineteenth assignment of error (Tr., 212-218) begins as follows, and then proceeds with nineteen paragraphs specifying as many particulars in which it is claimed that the findings of the trial judge were not justified by the evidence.

"The court erred in overruling and denying defendant's petition for a new trial in said action, to which ruling the defendant then and there duly excepted. And defendant now specifies the particulars in which the evidence was insufficient to justify the decision of the court, as follows."

The transcript does not contain the motion for a new trial, or the order overruling such motion, or any bill of exception relating thereto.

Argument.

The court will not consider the nineteenth assignment of error or any of the matters therein specified, for three reasons.

(1) While nineteen separate complaints are made of the findings of the trial judge, they all are presented as specifications of reasons why the court erred in overruling the defendant's motion for a new trial, such ruling constituting alone the gravamen of the assignment. Except for this assignment there is nothing in the transcript that shows that any such motion was made, and of course therefore, nothing that shows the contents of such motion, or that it was overruled by the court, or that exception was taken to the court's action. If otherwise proper to do so, the court would not consider an assignment of error based upon the overruling of a motion for new trial in such a state of the record.

(2) Under the federal practice the action of the trial

court in overruling a motion for a new trial is not assignable as error.

> Henderson v. Moore, 5 Cranch 11; Pomeroy's Lessee v. Bank of Indiana, 1 Wall. 592; Roemer v. Bernheim, 132 U. S. 103; New Orleans & N. E. R. Co. v. Jopes, 142 U. S. 18 (22); Conboy v. First National Bank, 203 U. S. 141 (145).

(3) Possibly an assignment that the court erred in overruling a motion for a new trial, based upon the proposition that the evidence was insufficient to support the judgment, might be treated as an assignment that the judgment was without support in the evidence. But such a practice could not properly be applied to an assignment that the court erred in overruling a motion for a new trial, based upon nineteen separate specifications of the insufficiency of the evidence to support particular findings, there being no specification that the evidence was insufficient to support the judgment itself. This court's rule 11 provides that the assignment of errors "shall set out separately and particularly each error asserted and intended to be urged," and that "errors not assigned according to this rule will be disregarded" except that the court "may notice a plain error not assigned."

As a matter of fact, each of the findings complained of not only was supported by evidence obviously sufficient to sustain it, but was correct. We do not enter now upon a discussion of the details, because for the reasons given we do not think any question of this character is presented by the record.

Election of Cause of Action.

proposition.

Only one cause of action is set up in the complaint.

Statement.

The first assignment of error (Tr., 189-190) complains of the refusal of the court to compel the plaintiff to elect between causes of action said to be three in number, but of which only two were mentioned in the motion. The motion was to require the plaintiff to say whether it was suing as assignee of the policy by virtue of the assignment thereof made by the receiver of Elmo Rock Company, or was proceeding on the theory that as surety it was entitled to be subrogated to the

rights of Elmo Rock Company. The court held that there was no occasion for requiring such an election.

Argument.

The complaint (Tr., 1-12) simply set out all the facts and prayed for judgment against the defendant for the amount which the plaintiff had paid in satisfaction of the Sowders judgment, together with interest thereon and an additional sum of $5 as protest fees. Its single cause of action was its right to recover this sum: Hutchinson v. Ainsworth, 73 Cal. 452, 15 Pac. 82. A theory of a case is not a cause of action. The plaintiff's claim was that by virtue of all the facts it was entitled to recover this sum of money. Among the facts set out in this complaint was the authorization and pursuant execution of an assignment of the policy of liability insurance by the receiver to the plaintiff. Not a word was said in the complaint about subrogation. In the assignment, a copy of which was attached as exhibit J to the complaint (Tr., 34-37), it was recited as one of the inducements to the assignment that the plaintiff was subrogated to all the securities held by Elmo Rock Company for the payment of the indebtedness represented by the Sowders judgment, and that the policy was such a security. The plaintiff's right to be subrogated to the policy induced, and was merged in, the assignment of the policy. Certainly there was here no cause for ordering an election.

Rulings on Evidence.

PROPOSITION.

The rulings on evidence of which complaint is made in assignments Nos. 2 to 16, inclusive, were correct.

Statement and Argument.

1. In taking the deposition of A. G. Wynne de bene esse, the witness, who was attorney for the plaintiff in the Sowders case, was asked what steps he took after the filing of the mandate for the collection of the judgment. At the trial the defendant objected to this as calling for secondary evidence, and the court overruled the objection. It does not appear that any such objection, or any objection at all, was made by the defendant's counsel representing it in the taking of the depo-

sition. This ruling forms the subject of the second assignment (Tr., 90-91, 190-191).

An objection to a remediable irregularity in the examination of a witness de bene esse participated in by the objecting party comes too late when made for the first time upon the trial. Within this rule are all such objections as that a question is leading, an answer is irresponsive, that a memorandum used to refresh the memory of the witness was not properly produced and qualified, that a suitable predicate was not laid for the introduction of secondary evidence, and all the numerous objections which if seasonably made could be easily remedied, but which are based upon rules of evidence, a strict compliance with which consumes time, adds to expense, is useless in most cases, and is constantly waived by common consent of counsel examining witnesses when there is no reason to suspect lack of frankness or any other impropriety. If a litigant wishes to insist upon strict compliance with such rules he must do so while the examination is in progress, and not wait until it is too late to cure the objections.

> York Company v. Central R. R., 3 Wall. 107 (113); Blackburn v. Crawfords, 3 Wall. 175 (191); Howard v. Stillwell & Bierce Mfg. Co., 139 U. S. 199 (205); In re Thomas, 35 Fed. 822; Bird v. Halsy, 87 Fed. 672; Samuel Bros. & Co. v. Hostetter Co., 118 Fed. 257, 55 C. C. A. 111; Smith v. Williams, 38 Miss. 48 (57); Rowe v. Godfrey, 16 Me. 128; Glasgow v. Ridgeley, 11 Mo. 34 (38, 40); Willey v. Portsmouth, 35 N. H. 303 (307); Hutchinson v. Bambas, 249 Ill. 624, 94 N. E. 987; Sheeler v. Speer, 3 Binney (Pa.) 130.

The ruling complained of was correct, because the steps taken by Sowders' attorney for the collection of his judgment did not, or might not, consist wholly of matters of record; and so far as they did consist of matters of record, it was proper to have him state what they were in order that suitable evidence might be procured regarding them and identified by his testimony.

2. To the question above mentioned the witness answered: "I applied to the firm of Meador & Davis, at Dallas, Texas, in person and by letter. They stated to me that their client would pay the money and it would come forward in a few days." No objection appears to have been made to this

at the taking of the deposition. At the trial the defendant moved to strike out the last sentence of the answer on the ground that it was hearsay evidence. The court overruled the motion, and this ruling is complained of in the third assignment (Tr., 90-91, 191). The testimony given was not subject to that objection. It was that Sowders' attorney applied to Meador & Davis in person and by letter regarding the payment of the judgment, and they stated that their client would pay the money and it would come forward in a few days. That is not a statement that their client said it would pay the money, but a statement by attorneys as to what their principal would do.

3. In the same deposition Wynne testified that his firm and Sowders and a bank assigned the Sowders judgment to the plaintiff. The defendant moved to strike out this statement as immaterial, irrelevant and incompetent, and not within the issue of the case, and the court denied the motion. Of this complaint is made in the fourth assignment (Tr., 93-94, 191-192). Testimony that the owners of the Sowders judgment assigned it to the plaintiff was not immaterial, irrelevant and incompetent, and without the issue of the case, because by such assignment the execution lien securing the judgment was kept alive in favor of the plaintiff and the loss on account of the Sowders judgment more effectually brought home to Elmo Rock Company.

4. In taking the deposition de bene esse of C. M. Crumbaugh, attorney for Elmo Rock Company and its receiver, the witness was asked what he knew about the proceedings connected with the payment of the Sowders judgment in so far as Elmo Rock Company and its receiver were concerned. It does not appear that any objection was made to this when the deposition was taken. Upon the trial the defendant objected to the question upon the ground that the record was the best evidence. The court overruled the objection, and of such ruling complaint is made in the fifth assignment (Tr., 100-101, 192-193). The objection was overruled by the court on the ground that the matter would not necessarily be matter of record, which was a sufficient reason. In addition the objection came too late when made upon the trial for the first time; and it was proper to have a statement from the attorney, not of the contents of records or of written instruments, but of the steps taken, so that suitable record evidence could be

obtained, if desired, and be properly connected with the proceedings. The answer given in response was merely of this character.

5. In answer to the question above mentioned, the witness stated in a summary way that certain proceedings were had in connection with the Sowders judgment. The details of all those proceedings were shown by certified copies of the record. The defendant moved "to strike out the portion of the answer which deals with matters of record, as not the best evidence." The court denied the motion, and thereof the defendant complains in the sixth assignment (Tr., 101-102, 193-195, 164-172, 154-164, 172-183). The witness was not undertaking to give the contents of records, but merely to show what steps were taken. The witness having shown this, the details were exhibited to the court by certified copies.

6. In the same deposition the witness Crumbaugh was asked regarding a conference between himself, the district judge and a representative of the law firm of Locke & Locke, attending the conference in behalf of the plaintiff, and regarding the understanding of the parties to that conference. By the question and his answer the witness testified that it was understood by the parties to the conference that the plaintiff was to pay the Sowders judgment in behalf of the Elmo Rock Company because it was surety on the supersedeas bond, and that it desired a transfer of the policy in consideration of such payment. No objection appears to have been made to this examination at the time of the taking of the deposition. On the trial the defendant objected to the question because it was not proper redirect examination, and because it was immaterial, irrelevant and incompetent, and because the policy was not so assignable as to render it the basis of an action in behalf of the plaintiff. The court overruled the objection. This ruling is the subject of the seventh assignment of error (Tr., 105-106, 195-196). This evidence was not immaterial or irrelevant, because it showed that the asignment subsequently made was made in pursuance of an arrangement antedating the payment of the judgment. That the policy was assignable has been shown on pages 8-9 ante. That the question was not proper on redirect examination is an objection that comes too late. Had it been made at the time of the examination, it could if necessary have been easily cured by

placing the same witness on the stand again, or by making the same proof through another witness.

7. In the deposition de bene esse of W. L. Leeds, the witness, who was an agent of the defendant company at the time of the various transactions and signed the policy of liability insurance in its behalf, and who participated in the proceedings relative to the appeal of the Sowders judgment, was asked what, if anything, within his knowledge, was done with reference to the making of a supersedeas bond in the Sowders case. He replied: "We had the bond made by General Bonding & Casualty Company of Dallas, after securing an indemnity bond from the Pacific Coast Casualty Company through the attorneys, Meador & Davis." No objection to this appears to have been made at the time of the taking of the deposition. On the trial the defendant moved to strike out all that part of the answer beginning with "after securing" upon the ground that "there is no authority shown." The court overruled the motion. This is the subject of the eighth assignment of error (Tr., 114-116, 196-197).

This suit is not based upon the indemnity bond, and the plaintiff does not seek to recover upon it. The making of the indemnity bond was merely one of the circumstances which led up to the making of the appeal bond and the incurring of a loss which the plaintiff is entitled to have reimbursed to it. The authority of Davis to sign this bond is only a collateral issue in the case. The bond would be in itself binding upon the defendant if Davis had original authority to execute it, or if having executed it without authority, his act was ratified by the defendant, or if, there being neither original authority nor ratification, the defendant held him out as having authority, and the plaintiff acted upon appearances in good faith and justifiably. The evidence on this collateral issue is mainly circumstantial in character and fragmentary. That which the defendant moved to strike out was one of the fragments. It showed that one of the agents of the defendant understood that the indemnity bond made by Davis was in fact secured from the defendant.

8. In the same deposition the witness Leeds testified without objection as follows: "I think that we were instructed, or we were authorized by J. F. Seinsheimer & Company, at Galveston, to have the bond made for the Pacific

Coast Casualty Company. Of course I am not positive of that, as I would have to refer to the files to see, but my impression now is that we were authorized by J. F. Seinsheimer & Company, of Galveston, to have the bond executed." Upon the trial the defendant moved to strike this answer out "as merely the conjecture of the witness, and not the best evidence." No objection to it had been made at the examination. The court denied the motion, and of this ruling the ninth assignment complains (Tr., 120, 197-198).

The objection was that the testimony was merely the conjecture of the witness and not the best evidence. No objection had been made at the examination. Had it been made then the examination could have been suspended to give the witness an opportunity to examine his files. Moreover, as suggested by the court, the communication between the witness and the defendant's general agents might have taken place otherwise than by letter or telegram. It was perfectly possible that such authority should have been given over the telephone. The testimony was not objectionable upon the ground that it was a mere conjecture of the witness. It is permissible for a witness to testify in such terms regarding matters of memory.

> 1 Wigmore on Evidence, § 726; 3 Chamberlayne on Evidence, § 1795; 2 Elliott on Evidence, § 827; 1 Greenleaf on Evidence (15th ed.), § 440; 5 Jones on Evidence, §816.

9. In taking the deposition de bene esse of John B. Stephenson, president of the plaintiff company, the witness was asked: "Please state as nearly as you can remember them, the negotiations that led up to the making of that bond. Give the history of the transaction." He answered: "Mr. Davis, of the firm of Meador & Davis, telephoned us that he would like to have us execute the bond as surety, and he asked me if we would be in the office and discuss the matter with him. On this, or the next day—perhaps it was the next day—Davis came over to the office with the form of bond he wanted executed, and stated that there would be no liability to our company, that the case would be taken care of in the event it was affirmed, and under those representations we signed the bond." No objection was made to this at the time of taking the deposition. On the trial the plaintiff objected to the ques-

tion, and that objection having been overruled it moved to strike out the answer "as immaterial, irrelevant and incompetent, no proper foundation for the introduction of such evidence being laid, it not being shown that Mr. Davis was anything other than representing the Pacific Coast Casualty Company in the defense of this damage suit," and having no authority to bind his client by entering into an agreement for an appeal bond. The court denied the motion, and this forms the subject matter of the tenth assignment of error (Tr., 121-122, 198-200). The testimony was merely a statement of what occurred. Whether it was binding upon the defendant was another question, and as to that question the evidence was in conflict. In such circumstances it could not be improper to show what took place, leaving open for determination upon all the evidence in the case the effect of that which took place.

10. In the same deposition the witness was asked in whose behalf Davis represented himself to be acting in applying to the witness for the execution of the supersedeas bond. No objection was made at the time of taking the deposition, but on the trial the defendant renewed to this question the same objection that it had made to the question last above mentioned. The court overruled the objection and this ruling forms the subject of the eleventh assignment of error (Tr., 123, 200-201).

The declaration of Davis that he was authorized by the defendant to act for it of course would not be evidence of his authority. But whether he had authority to act for the defendant was an entirely different question from the one whether he claimed to be acting for the defendant. The defendant would not be bound unless Davis in truth acted in its behalf, or unless he had authority so to act. For instance, if he had had undisputed authority to act for the defendant, but made the application in behalf of Elmo Rock Company alone, the defendant would be in no wise bound by the transaction. In so far as it was material to show that the indemnity bond and the procurement of the appeal bond were acts of the defendant, it was necessary that the plaintiff show both these elements, and the question to which objection was made was directed to one of the elements.

11. In the same deposition the witness was asked whether he was familiar with the usages and practices at

Dallas, and in the state of Texas, with regard to the procurement by attorneys at law of the execution by surety companies of appeal bonds for their clients, and having answered that he was, he was asked what was the practice in that regard. To this the defendant objected on the trial as being immaterial, irrelevant and incompetent, and not binding upon the defendant in any manner. The court at first sustained the objection, but having heard the answer and the next question and answer, the ruling was withdrawn and all the testimony was admitted. The testimony was to the effect that such matters usually were taken up with the plaintiff by the appealing company's attorney, and that the witness did not remember having executed an appeal bond in which the appealing company took the matter up with the plaintiff directly, and that so far as he knew such was the general usage in the offices of other companies in his locality. The defendant renewed its objection to all the testimony. The action of the court in admitting this testimony is the subject of the twelfth and thirteenth assignments of error (Tr., 123-124, 201-203).

If the defendant held Davis out as its agent having authority to procure the appeal bond and to make the usual contract of indemnity against loss on account thereof, and if the plaintiff acted in good faith and otherwise justifiably upon the belief that Davis had the authority which he was made to appear to have, the defendant is bound by the act of Davis, even though Davis may have acted contrary to his private instructions. A corporate principal which sends out an agent to act for it in a particular matter thereby holds him out as having the authority which at the time and in the place it is usual for such agent to possess with regard to such matters, and secret instructions contrary to the usual customs of the business as carried on in that place will not exonerate the principal from responsibility for the agent's acts. Therefore what those customs are is always a pertinent inquiry in such a case. The complaint alleges (Tr., 5-7) that Davis had actual authority in advance, that the defendant ratified his action, and that "the defendant held out the said John Davis to the plaintiff as having authority to deal with it in the usual course of business with reference to the matter of obtaining from it the execution of such supersedeas appeal bond and indemnifying the plaintiff against loss thereby incurred, and the plaintiff without notice of any defect in the authority of

the said John Davis dealt with him in the usual course of business and in reliance upon the authority which he apparently possessed, and executed said supersedeas appeal bond in consideration of the making of said contract of indemnity." The testimony objected to was directed to the proof of this last allegation.

12. In the same deposition the witness was asked to state what, if any, information he had at the time of executing the appeal bond concerning the extent and nature of the authority of Davis to represent the defendant in the matter of getting the supersedeas appeal bond. The answer was: "We understood he had full authority to act for the Pacific Coast Casualty Company in the matter of procuring a surety on the proposed appeal bond." No objection was made either to the question or to the answer at the time of taking the deposition. On the trial the defendant objected to the question "as immaterial, irrelevant and incompetent." The court having overruled the objection and the answer having been read, the defendant moved to strike it out as irresponsive, and as stating the conclusion of the witness rather than his information. The court does not appear to have ruled expressly upon this motion. The fourteenth assignment of error complains of the overruling of the objection to the question (Tr., 124-125, 204-205).

The objection was that information sought by the question was immaterial, irrelevant and incompetent. Obviously it was not so. Davis had testified that he showed Stephenson a letter in which he was instructed by the defendant that the Elmo Rock Company must make its own supersedeas bond. The witness answered that he understood that Davis had full authority in the matter. The defendant moved to strike this out as irresponsive, which objection came too late, and as stating the conclusion of the witness rather than his information, which objection also came too late. Moreover, the statement of the witness as to what he understood evidently was merely his way of stating that he had no information to the contrary.

13. In the same deposition the witness was asked: "Was the matter of his authority discussed between you?" Upon the trial the defendant objected to this question "as immaterial, irrelevant and incompetent, and no foundation laid." The court overuled the objection, and the witness gave an

answer to which no separate objection was made on the trial; and none was made to any part of the colloquy at the time of taking the deposition. The overruling of this objection is the subject of the fifteenth assignment of error (Tr., 125-126, 205-206).

As above stated, Davis had testified that he showed Stephenson a letter instructing him that Elmo Rock Company must make its own supersedeas bond. The question was pertinent to the issue whether the plaintiff had acted in good faith upon the apparent authority of Davis, and was pertinent to the testimony upon that issue given by Davis.

14. After the depositions of Davis and Stephenson had been read, the plaintiff offered in evidence the original indemnity agreement signed by Davis, a copy of which constitutes exhibit D to the complaint. The defendant objected "to the introduction of that paper upon the ground that it affirmatively appears that Mr. Davis did not have authority to sign that as attorney in fact of the Pacific Coast Casualty Company." The court admitted the paper subject to the objection. Afterward the court found as matters of fact that Davis called on the president of the plaintiff company, and obtained from it the supersedeas appeal bond, and as an inducement to the issuance thereof gave to it the indemnity contract, and that Stephenson, the president, who acted for the plaintiff company in the matter, was not shown the defendant company's letter of June 28, 1912, to its attorneys, and was not in any way made aware of any limitations upon the authority of Davis, and dealt with him in the supposition that his authority was that which was usual in such cases and was apparently possessed by him, and that both Davis and Leeds knew of the transaction with Stephenson and of the giving of the indemnity contract. The admission of this paper forms the subject of the sixteenth assignment of error (Tr., 149-151, 206-208, 76-78).

Whether Davis had authority to execute the paper was a disputed question in the evidence, and the paper itself was clearly admissible in such circumstances. The execution of this paper was an important link in the chain of circumstances by which the plaintiff was drawn into the loss of its money that it now seeks to recover. The plaintiff is not suing upon the indemnity contract, but it exhibits to the court the contract and the circumstances attending its execution, in order

to show how it happened that it became interested in this matter, and became entitled to recover from the defendant the amount of its loss.

CONCLUSION.

From the foregoing it appears that justice will be done, and that the law will be satisfied even to its minutest regulation of procedure, if the judgment of the district court be allowed to stand; and accordingly the defendant in error prays that the same be in all things affirmed.

Respectfully submitted,

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Dallas, Texas, May 3, 1916.